Filed 3/2/10 Bell v. Centinela Hopsital CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LACHERYL BELL, Plaintiff and Appellant, v. CENTINELA HOSPITAL, A CAL. STATE CHARTERED HEALTH CARE CORP. et al., Defendants and Respondents.	B213602 (Los Angeles County Super. Ct. No. YC054679)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary Nagashito, Judge. Reversed and remanded with directions.

Law Offices of John K. Fu and John K. Fu for Plaintiff and Appellant.

Herzfeld & Rubin, Michael A. Zuk and Stephanie L. Rockey for Defendants and Respondents.

The plaintiff in this case, LaCheryl Bell (plaintiff), has appealed from a stipulated judgment entered in favor of a defendant after a request for admissions (Code Civ. Proc., § 2033.010 et seq., RFA)[1] served on plaintiff was deemed admitted in favor of the defendant because of plaintiff's failure to timely and properly respond to the RFA. The admissions prevented plaintiff from establishing her case at trial. Prior to entry of the judgment the trial court denied plaintiff's motion to have the deemed admissions set aside.

Our task in this appeal is to determine (1) whether propounding the RFA on plaintiff was permissible and thus plaintiff had a duty to properly respond to it; and (2) whether the court erred in not exercising its discretion in favor of plaintiff when it decided the motion to have the RFA deemed admitted. The answer to those issues is "yes." The RFA was propounded by a party to the case and plaintiff was required to properly respond to it. However, the trial court should have exercised its inherent discretion and treated the inappropriate objections that plaintiff made in her response to the RFA as mere surplusage which can be ignored by court and counsel.

Plaintiff presents additional issues in her appeal, including whether the court abused its discretion when it denied plaintiff's motion for relief from the deemed admissions. However, because we find that the trial court should have exercised its discretion in favor of plaintiff in deciding the motion to have the RFA deemed admitted, we need not decide the other issues raised by plaintiff.

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[1] Unless otherwise indicated, all references herein to statutes are to the Code of Civil Procedure.

The stipulated judgment will be reversed and the case will be remanded for further proceedings.

BACKGROUND OF THE CASE

1. *The Complaint*

Acting inpropria persona, plaintiff filed this suit on February 16, 2007, seeking damages for what she asserts was the wrongful death of her mother who was hospitalized at Centinela Hospital (the hospital) at the time of her death. Besides the hospital, plaintiff also named as defendants David Defren and Edgar Musngi, whom the complaint alleges are doctors employed by the hospital (Defren and Musngi, or together, the doctors).[2]

According to the complaint, plaintiff's mother, Vonnel Bell (decedent), had been receiving chemotherapy treatments for breast cancer, and on November 15, 2005, decedent was "admitted . . . back into the Hospital" and "placed into the care and custody of the defendants" because she was "experiencing shortness of breath," "whereupon they stated that [decedent] may have an acute thyroid stone condition." She died on November 18, 2005, while still in the hospital. Plaintiff alleges the defendants "repeatedly assured [plaintiff] [that [the decedent's] cancer had been arrested and [decedent] was clear of cancer."

Plaintiff's first cause of action is for negligence and alleges the hospital is liable for the other defendants' actions under a theory of respondeat superior. It alleges defendants misdiagnosed decedent's condition and administered the wrong drug

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[2] A third doctor, Dr. Ray Williams was also named as a defendant. He did not appear in the case and his default was taken in November 2007.

treatment, which resulted in the decedent dying of cardiopulmonary arrest and plaintiff suffering damages from her death.

Plaintiff's second cause of action, for fraud, realleges all preceding allegations and adds that "[b]y reason of the foregoing, the defendants have defrauded [plaintiff]" and plaintiff suffered damages. The third cause of action is for tortious interference with personal relations and it alleges plaintiff suffered damages by defendants' interference with her relationship with the decedent.

2. *Defendants' Responses*

On May 14, 2007, Dr. Musngi demurred on grounds of uncertainty to all three causes of action, asserting it could not be determined from the complaint whether plaintiff is the only proper (necessary) plaintiff or if there are other heirs who should be joined to the case. He demurred to the third cause of action on the ground that there was no cause of action for tortious interference with personal relations and the asserted non-economic damages in that cause of action could be claimed in the cause of action for negligence/wrongful death. Regarding the cause of action for fraud, he asserted it did not allege fraud with sufficient specificity. On June 26, 2007, on the grounds asserted, the trial court sustained the demurrer to the third cause of action without leave to amend and sustained the demurrer to the first and second causes of action with 15 days leave to amend. Plaintiff, however, never filed an amended complaint.

Although Drs. Defren and Musngi were represented by the same law firm in the trial court, Defren did not demurrer to the complaint. Instead, on August 27, 2007, he filed an answer with a general denial and affirmative defenses. In the meantime, the

hospital answered the complaint with its own general denial and affirmative defenses on May 15, 2007.

3. *The RFA and Motion to Have the Matters in the RFA Deemed Admitted*

On November 2, 2007, Dr. Musngi served an RFA on plaintiff. Four facts were asserted for admission: (1) Dr. Musngi was not, to a reasonable medical probability, a cause of decedent's death; (2) Dr. Defren was not, to a reasonable medical probability, a cause of decedent's death; (3) the decedent died as a result of metastatic breast cancer; and (4) at the time of the decedent's admission to the hospital that is the subject of this law suit, the decedent had end stage metastatic breast cancer.

The record contains a proof of service showing that plaintiff served a response to the RFA on the doctors' attorney on November 19, 2007, which was within the statutory time period for responding (§ 2033.250), and filed the response and proof of service with the court the next day. Plaintiff's response to the four matters in the RFA is set out under the title "OBJECTIONS." Although she stated in the response that she objected to the RFA, *the four matters in the RFA for which admissions were sought were in fact answered by plaintiff with very clear denials*. Her "objections" were clearly to the *truth* of the four requests. However, although section 2033.240 requires that a response to an RFA be signed under oath unless it contains *only* objections, plaintiff's response was not verified despite the clear denials in it.

On February 15, 2008, attorney John Fu was substituted as plaintiff's attorney record. On April 11, 2008, Drs. Defren and Musngi served and filed a motion for an order that the truth of the matters set forth in the RFA be deemed admitted and

established, and they sought an award of $1,690 as sanctions (costs and attorney's fees) for bringing the motion. (§ 2033.280, subds. (b) & (c).) The motion was set for May 12, 2008. The ground for the motion was that no response to the RFA had been served by plaintiff on Dr. Musngi, the propounding party.

Subdivision (c) of section 2033.280 provides that the court must deem the matters in an RFA admitted unless it finds that the party to whom the RFA was directed but who did not timely serve a response, has served, before the hearing on the deemed admitted motion, a proposed response to the RFA that is in substantial compliance with section 2033.220. Section 2033.220 sets out requirements for responses to an RFA. Whether the requests are deemed admitted by the court or not, subdivision (c) of section 2033.280 requires that the court make an order for sanctions in favor of the party that served the RFA.

Plaintiff filed opposition to the doctors' motion. The opposition included a second response to the RFA (dated April 24, 2008). The doctors filed a reply, and plaintiff filed supplemental opposition. The doctors' motion to establish admissions and for sanctions was heard and taken under submission on May 12, 2008. By minute order dated May 16, 2008, the motion was granted and sanctions in the amount of $700 were awarded. On that same day the court mailed a copy of the minute order to plaintiff and the doctors.

4. *Plaintiff's Section 1008 Motion for Relief from the Deemed Admitted Order*

On May 28, 2008, plaintiff filed an ex parte application for an order shortening time to serve a section 1008 motion to have the deemed admissions set aside, or

alternatively to have the deemed admissions amended under section 2033.300. Alternatively, plaintiff asked the court to stay an upcoming hearing on summary judgment motions filed by the doctors, pending "an appeal" by plaintiff.[3] The application for an order shortening time was granted and a hearing was set for June 17, 2008 for plaintiff's motion.[4] The doctors filed opposition papers to the motion and on June 17, 2008, the motion was denied.

5. *Summary Judgment, Dismissal of Dr. Musngi, and the Stipulated Judgment*

Thereafter, on July 21, 2008, the court issued a minute order on motions for summary judgment or alternatively summary adjudication of issues that had been filed by Doctors Musngi and Defren. The minute order states that on July 3, 2008, plaintiff dismissed Dr. Musngi from the case and thus his motion for summary judgment/adjudication was moot. Regarding Dr. Defren, the court denied his request for

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[3] Perhaps plaintiff meant to say writ rather than appeal.

[4] Both in her moving papers and at the June 17, 2008 hearing plaintiff characterized her motion as a section 1008 *renewal* motion. The doctors properly characterized it as a section 1008 *motion for reconsideration*.

Subdivision (a) of section 1008 provides that when an application for an order has been made to the court, a party affected by the order the court makes on the application may move the court to have the order reconsidered and modified, amended or revoked. Section 1008, subdivision (a) provides that the application for reconsideration must be based on "new or different facts, circumstances, or law."

Subdivision (b) of section 1008 provides that *a party who originally made an application for an order* that was refused in whole or part, or conditionally granted or granted but with terms, may make an application for the same order "upon new or different facts, circumstances, or law." Obviously plaintiff's section 1008 motion cannot be a subdivision (b) motion for renewal because she was not the moving party in the motion that produced the order deeming admitted Dr. Musngi's RFA. She was the opposing party. Thus, her section 1008 motion was a motion for reconsideration.

a summary judgment because (1) his request for judicial notice of the deemed admissions was not timely filed for the summary judgment motion, and (2) although Defren submitted the declaration of a medical expert in support of the summary judgment/adjudication motion, plaintiff submitted a controverting declaration from a medical expert that raised a triable issue of material fact whether it was Defren's negligence that caused decedent's death. Defren's motion for summary adjudication of the causes of action for fraud and tortious interference with personal relations, however, was granted.

The reporter's transcript for this appeal shows that at a hearing on August 8, 2008, plaintiff and Dr. Defren informed the court that for purposes of appeal, they had reached an agreement, based on the RFA having been deemed admitted, that trial on plaintiff's claims against Defren would be pointless and they would stipulate to a judgment in favor of Defren, with the judgment being based solely on the deemed admissions. On October 1, 2008, plaintiff filed an appeal from such stipulated judgment.

CONTENTIONS ON APPEAL

Plaintiff contends the RFA was improperly propounded because it was served by Dr. Musngi. She asserts he was not a party against whom there were any causes of action pending when he served the RFA since his demurrer was sustained without leave to amend as to one cause of action and with leave to amend to the other two causes of action and plaintiff never filed an amended complaint.

Plaintiff further contends the order granting the motion to have the RFA deemed admitted was made in error because (1) the record shows that plaintiff's original response

to the RFA (the response made by plaintiff acting inpropria persona) was served by plaintiff on the doctors' attorney; (2) a verification for that response was not necessary because the response consisted of objections to the requests in the RFA; (3) the trial court's assertion that plaintiff's response did not conform with statutory requirements because it did not simply admit or deny each of the four requests but rather contained "long rambling objections" is not a proper reason to deem the requests admitted because there was no meet and confer on the response; (4) it was not improper for plaintiff's attorney to include objections in plaintiff's second response to the RFA; (5) both the original (November 2007) response and the second (April 2008) response were in substantial compliance with the statutes governing RFAs; and (6) the attorney representing the doctors promised, in open court at the hearing on the motion to have the RFA deemed admitted, that he would withdraw that motion if a proof of service of the first response was provided to him, and it was so provided.

Alternatively, plaintiff contends that the court should have granted her section 2033.300 request to have the deemed admission amended because there was mistake and excusable neglect with respect to the responses to the RFA and there would be no substantial prejudice to Dr. Defren.

DISCUSSION

1. *Plaintiff Has Implicitly and Reasonably Admitted That It Was Necessary for Her to File a Response to the RFA*

Plaintiff asserts the RFA was not properly propounded on her because it was served in the name of Dr. Musngi and, plaintiff contends, he was not a party to this case

when the RFA was served. Thus, her argument goes, she had no discovery duty to respond to the RFA and therefore the deemed admission motion should not have been granted. As noted, plaintiff bases this argument on the fact that after Dr. Musngi's demurrer to the complaint was sustained without leave to amend as to one cause of action and with leave for the other two, plaintiff never amended the complaint. Regarding plaintiff's position, the appellate record reveals the following.

One, it was not until July 3, 2008, that plaintiff filed a dismissal, without prejudice, of all causes of action against Dr. Musngi. Between the ruling on Dr. Musngi's demurrer and that dismissal, Dr. Musngi was active in the case. He served the RFA, moved for deemed admissions, defended the order granting that motion, and made a motion for summary judgment. He was not dismissed until after the activity on the RFA had been concluded in the trial court.

Two, it was on May 28, 2008, that plaintiff filed her ex parte application for an order shortening time to serve her sections 1008/2033.300 motion for relief from the deemed admitted minute order. That was before Musngi was dismissed from the suit. On page 3 of those ex parte papers, plaintiff made this statement: "[T]he *three defendants active in this lawsuit* have all filed for summary judgment which is scheduled to be heard in early July 2008." (Italics added.) Given that there were only four defendants named in the complaint and defendant Dr. Williams' default was taken in November 2007, the three defendants who were still active in the case must have been the hospital, Dr. Defren, and *Dr. Musngi*. Thus, plaintiff implicitly stated in her section 1008 papers that Musngi was a party at the time the court deemed admitted the RFA.

Three, in plaintiff's original response to the RFA, in the response prepared by her attorney, and in her moving and opposition papers concerning the RFA, plaintiff acknowledged that Dr. Musngi was a propounding party. She never objected to discovery from him in her trial court papers.

In spite of these matters, plaintiff argues *for the first time on appeal* that she had no duty to respond to the RFA because it was propounded by Dr. Musngi and he had no status to propound discovery after her time to amend the complaint lapsed. *Blodgett v. Trumbull* (1927) 83 Cal.App. 566, relied on by plaintiff, is of no help to her on this issue. In *Blodgett*, a defendant was found to not be a proper party because there was no actual claim against him that the plaintiff could state. That is, from the very filing of the suit he was not validly a party. That cannot be said about Dr. Musngi. Nor is *Adkins v. Model Laundry Co*. (1928) 92 Cal.App.575 supportive of plaintiff's position on the issue whether Musngi continued to be a party in this suit after plaintiff failed to amend her complaint against him. In *Adkins*, the plaintiff failed to amend a cause of action after the trial court sustained a demurrer to it, but at trial was nevertheless permitted by the court to elicit testimony from witnesses regarding that same cause of action. The *Adkins* court stated the testimony was improperly admitted because the cause of action was "abandoned" by plaintiff. The case did not involve the question who was a party.

Moreover, Code of Civil Procedure section 581, subdivision (f) (2) states that when a plaintiff fails to amend a complaint within the time permitted by the court after a demurrer to the complaint has been sustained with leave to amend, "either party" may move for a dismissal. The reference to either *party* means the plaintiff and the demurring

defendant. Thus, the defendant continues to be a party to the action until dismissed by either party. In *Budget Finance Plan* v. *Superior Court* (1973) 34 Cal.App.3d 794, the plaintiffs propounded discovery on certain defendants who had successfully demurred to the complaint. The demurrer was sustained with leave to amend. An order made by the trial court directing those defendants to answer interrogatories was affirmed by the reviewing court even though at the time the order was made the plaintiffs had not yet amended the complaint. The reviewing court rejected the defendants' contention that because the plaintiffs did not have a pleading at the time the discovery order was made by the trial court, the plaintiffs were not parties. The court observed that the discovery statutes provide for discovery by any *party*, and the court discussed several statutes that would be without effect if a plaintiff were to be considered a non-party simply because a demurrer had been sustained to the plaintiff's complaint without leave to amend, or sustained with leave and no amended complaint was filed. (*Id*. at pp. 797-798.)

2. *Technically There Was a Valid Basis for Deeming the RFA Matters Admitted; However, the Trial Court Should Have Exercised Its Discretion to Deny the Deemed Admitted Motion*

a. *Introduction*

As noted above, subdivision (c) of section 2033.280 provides that a court must deem the matters in an RFA admitted unless it finds that the party to whom the RFA was directed, but who did not timely serve a response, has served, before the hearing on the deemed admitted motion, a proposed response to the RFA that is in substantial compliance with section *2033.220*. Section 2033.220 states that each answer in a response to an RFA must admit as much of the matter stated in the request as is true,

deny as much of it as is not true, and specify that portion of the matter in the request for which the responding party lacks sufficient information or knowledge as to the truth.

In her opposition papers to the motion to have the RFA deemed admitted, plaintiff asserted in her own declaration that she "ha[s] no records or recollection of ever receiving" the RFA. This representation was made to the court despite the fact that she served and filed the abovementioned November 2007 response to the RFA. Besides contending that she never received the RFA to which she had already filed and served a response, her opposition to the motion also asserted that because she was acting as her own attorney at the time the RFA "was alleged [sic] propounded,]" "she was not familiar with her legal duties regarding discoveries" and therefore if the RFA "was properly propounded, the failure to respond was result of plaintiff's excusable neglect."[5]

As noted above, with her opposition to the doctors' motion to have the RFA deemed admitted, plaintiff submitted a response (her second response) to the RFA. In it she objected to the first two requests as being compound. Additionally, she asserted she

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[5] Plaintiff cited subdivision (a) of section 2033.280, which provides that if a party fails to provide a timely response to an RFA, that party waives any objection to the RFA but the court may relieve the waiver if (1) the party serves a response that is in substantial compliance with certain RFA statutes (§§ 2033.210, 2033.220, 2033.230), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence or excusable neglect. Section 2033.280 states that the court "*on motion*" may grant such a request for relief. That is, the person seeking relief must make a motion for it.

Whereas subdivision (a) of section 2033.280 provides a method for relief from waiver of objections for failure to timely serve a response to an RFA, subdivision (c) of that same section provides a method for relief from having the truth of matters specified in an RFA be deemed admitted. To obtain that relief, the party to whom the RFA was directed must serve, before a hearing on the propounding party's motion to have the matters deemed admitted, a proposed response to the RFA that is in substantial compliance *with section 2033.220*.

was not a qualified expert to make any medical or legal conclusions and the requests called for improper opinions and speculation. She also denied all four requests. This time her response was verified. In their reply papers, Drs. Musngi and Defren asserted that because plaintiff had failed to *timely* respond to the RFA, she had waived the right to make objections to it and therefore, because the proposed response that she served with her opposition papers contains objections, such proposed response was not in substantial compliance with section 2033.220, which is the statute that the Legislature stated, in section 2033.280, subdivision (c), must be complied with in order to not have the RFA be deemed admitted. As noted, section 2033.220 does not provide for objections to requests; it provides for three options in responding to an RFA: admit, deny, and/or specify that the responding party lacks information or knowledge regarding a matter.

On May 9, 2008, plaintiff submitted supplemental opposition to the deemed admitted motion. The supplemental opposition included a declaration from plaintiff's attorney, John Fu, in which Mr. Fu stated the following. When he was preparing the initial opposition to the motion to have the RFA deemed admitted, he made a telephone inquiry to plaintiff and "she indicated to me that she might not have respond [sic] to the RFA." Mr. Fu opined to the court that plaintiff "apparently was not aware for what I was referring to specifically." He stated that since plaintiff was representing herself "at the time of the response, I had to rely solely on her representation" and for that reason the opposition papers he initially filed were based on that representation from plaintiff. However, after plaintiff made that representation to him she called him and asked him to what RFA he was referring. He faxed to her a copy of the RFA and she told him that she

had responded to it in November by filing her response with the court and sending the response to the doctors' attorney. She sent Mr. Fu a conformed copy of her original response and he in turn informed the doctors' attorney, Mr. Wall, about it.

In an April 29, 2008 letter to Mr. Wall, plaintiff's attorney explained plaintiff's "mistake" and included a verification for the unverified response to the RFA that plaintiff had served in November 2007. The verification is dated April 24, 2008. *It is a copy of the verification that was attached to plaintiff's second (April 2008) response to the RFA, and the record does not disclose any way of knowing whether plaintiff actually meant for her April 24, 2008 verification to apply to both her November 2007 response and her April 2008 response, or whether Mr. Fu just included it with the copy of plaintiff's November 2007 response that he sent to Mr. Wall.* Mr. Fu opined to Mr. Wall that the explanation of plaintiff's mistake about whether she had actually served a response to the RFA, taken together with her April 24, 2008 verification, "should put this matter to an end," and he asked Wall to take the motion to have the RFA deemed admitted off calendar. In his declaration submitted with plaintiff's supplemental opposition to the deemed admitted motion, Fu asserted that because plaintiff served the November 2007 response to the RFA, "[a]ny procedural errors created by then plaintiff in pro per were corrected by my April 29, 2008 letter."

In its minute order granting the doctors' motion to have the RFA matters deemed admitted, the trial court noted that plaintiff had "demonstrated a clear familiarity with court and statutory rules in her previous filings with the court on other matters." The court listed the following four grounds for granting the doctors' motion. First, plaintiff

did not present, with any of her papers opposing the motion to have the RFA deemed admitted, a proof of service that demonstrates her November 2007 unverified response to the RFA was served on the moving parties. Second, even if that response to the RFA was served on the doctors, it was not verified when it was served and therefore could not be timely. Third, the response did not conform with statutory requirements in that the response did not simply admit or deny each of the four requests but rather contained "long rambling objections." Fourth, the verified (second) response to the RFA that plaintiff served on April 24, 2008 in conjunction with her opposition to the motion to have the RFA deemed admitted was not in substantial compliance with section 2033.220's requirements for responses to RFAs because the response contained objections even though the right to object was previously waived due to the untimeliness of that response. The court stated that if plaintiff's second response had been in substantial compliance with section 2033.220, "there might be discretion in the court's decision."

b. *Analysis*

The trial court's decision to grant the doctors' deemed admitted motion was supported by a technically valid analysis. To begin with, although plaintiff actually had in her possession convincing proof that her initial (November 2007) response to the RFA was served on the doctors (namely, a proof of service that states the date of service and the document served [the response to the RFA]), she failed to present that proof to the court in both her original and her supplemental opposition to the doctors' motion to have the RFA deemed admitted. It was not until later when she made her

sections 1008/2033.300 motion for relief from the deemed admitted order that she presented the proof to the court.

Moreover, the response to the RFA that she served in November 2007 was not valid because it contained denials of the requests in the RFA and the denials were not verified. Section 2033.240 states that the party to whom the RFA is directed "shall sign the response under oath, unless the response contains only objections." Plaintiff's initial *unverified* response was the equivalent of having served no response at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.) Plaintiff's contention that her verification was not necessary because her initial response was only an "objecti[on] to the entire request 'entirely' " does not withstand a reading of that initial response. The only objections made in that response were to the truth of the four requests. That is, the "objections" were in reality a denial of the truth.

Thus, because plaintiff's original response to the RFA was not verified it did not suffice as a response and therefore the trial court had sufficient reason to deem the RFA admitted. Technically then, the only way for plaintiff to avoid a deemed admitted order was to have followed the instructions in section 2033.280, subdivision (c). That subdivision specifically states that she would have to serve, before the hearing on the doctors' deemed admitted motion, a proposed response *that substantially complies with section 2033.220*. She did not do that because her proposed response contained objections and section 2033.220 does not state the responding party may object to requests in the RFA. Moreover, even if section 2033.220 did provide for objections, under the provisions in section 2033.280, subdivision (a), plaintiff waived the right to

make objections to the RFA by not timely serving a response to the RFA, since the failure to verify her initial response was the equivalent of serving no response at all. Although section 2033.280, subdivision (a) provides a method for relief from the waiver of the right to object to the RFA, that method is to file a motion for relief and plaintiff never filed such a motion; therefore she was not entitled to relief from the waiver of the right to object. Thus, even if section 2033.220 did provide for making objections to an RFA, plaintiff could not have properly made them since she had waived the right to object and never regained that right. Therefore, one could say that the trial court's order deeming admitted the matters in the RFA was technically correct.[6] [7]

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[6] Plaintiff's reliance on *Food 4 Less Supermarkets, Inc. v. Superior Court* (1995) 40 Cal.App.4th 651 is misplaced. There, the court addressed a response to a request for production and inspection of documents. The court stated that if a written response to such a request contains both objections and "fact-specific responses" and is served within the statutory time period for responding but the objections are not verified, the lack of verification will not result in a waiver of the objections made in the response and such objections will be considered timely, whereas if the fact-specific responses are not verified then that portion of the response will be considered untimely. Further, said the court, if the unverified response contains no objections, the result would be that the response was untimely and there was a waiver of objections. (*Id*. at pp. 657-658.) Here, as noted above, the initial response, despite its use of variations of the term "objection," did not in fact contain objections as that term is normally used with respect to an RFA. The objections were to the *truth* of the four requests in the RFA and the objections were thus denials.

[7] We reject plaintiff's contention that at the May 2008 hearing on the deemed admitted motion the doctors' attorney, Mr. Wall, stated he would withdraw that motion if plaintiff produced a proof of service of her having served her initial response on the doctors. That is not what the doctors' attorney said. Rather, he told the court that *in April 2008* he made an offer to Mr. Fu, plaintiff's attorney, to withdraw the motion if Mr. Fu could produce for him both a copy of the initial response that plaintiff served and proof of service showing that the initial response was served within the statutory time allowed, but plaintiff's attorney only produced the initial response and not a valid proof of service.

However, it is also clear that the Legislature, in enacting the current RFA statutes, continued the judicial philosophy of California case law that cases should generally be decided on their merits. Thus, relief from having RFAs deemed admitted was provided for in sections 2033.280 and 2033.300. In *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403 this court examined the philosophy of relief behind section 2033.300's provisions for withdrawal or amendment of admissions under certain conditions. We said that the statute "eliminates undeserved windfalls obtained through requests for admission and furthers the policy favoring the resolution of lawsuits on the merits. [Citation.]" (*Id*. at p. 1418.) We observed that the provision in section 2033.300 regarding relief based on mistake, inadvertence and excusable neglect is identical in most respects to the language and spirit of section 473, subdivision (b), and the two statutes serve similar purposes. We noted that in *Elston v. City of Turlock* (1985) 38 Cal.3d 227 the court held that while motions for relief under section 473 are to be decided by a trial court using its discretion, that discretion is not unlimited and it must be exercised in conformity with the spirit of relief intended by the statute so that substantial justice is served, not defeated, and thus because the law favors that cases be tried and decided on their merits, if there are any doubts whether relief should be granted they must be resolved in favor of the person seeking relief. (*New Albertsons, Inc*., *supra*, 168 Cal.App.4th at p. 1419.)

In the instant case the matter of the inclusion of objections in plaintiff's second response to the RFA is something the trial court should have considered using its power of discretion to see that substantial justice is served. The objections, though technically

not permitted by the language of section 2033.280, subdivision (c), were also not proper because plaintiff never bothered to seek relief under subdivision (a) of section 2033.280 from her waiver of the right to make objections, something she could have easily done by filing a motion for relief when she filed her objection to the deemed admitted motion. Nevertheless, the improper objections should have been deemed "surplusage" by the court in ruling on the motion to have the RFA deemed admitted. By so "removing" the objections from plaintiff's second response, the result would have been that the response simply contained denials to all four of the matters sought by the RFA to be admitted, and because the response was verified and filed before the hearing on the deemed admitted motion, the motion should have been denied. That way the court would avoid handing the defendant doctors a windfall on an RFA by which they would seek to foreclose plaintiff from pursuing her case against them on its merits. We perceive no prejudice to Dr. Defren in that result other than his having to defend the suit on its merits.

DISPOSITION

The stipulated judgment from which plaintiff has appealed is reversed and the cause is remanded to the trial court for further proceedings consistent with the views expressed herein. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.